Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JAMES M. MACDONALD, II, AS TRUSTEE AND SOLE BENEFICIARY OF THE WALTER MIDDLETON & COMPANY RETIREMENT PLAN AND WALTER MIDDLETON & COMPANY FROZEN RETIREMENT PLAN, PETITIONER

v.

ESTATE OF JOSEPH W. GAYTON AND MONICA M. GAYTON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On August 7, 2003, James M. Macdonald, II, filed a lawsuit in the United States District Court for the Northern District of Illinois to collect on various notes relating to loans he made to Joseph Gayton. On October 28, 2003, James M. Macdonald, II, as requested by the court, provided the District Court Judge with the necessary affidavit to enter the default judgment against Joseph Gayton. On December 22, 2003, *nunc pro tunc* October 28, 2003, Judge Charles R. Norgle, Sr., entered a judgment in the amount of Three Hundred Fifty Seven Thousand Thirty Nine Dollars and Eighty Nine Cents. Joseph Gayton died on November 26, 2003, before the *nunc pro tunc* judgment was entered, and while the default judgment was pending before Judge Norgle. Macdonald thereafter filed a lawsuit under the Illinois Uniform Fraudulent Transfer Act relating to a quitclaim deed from Gayton's to his wife, Monica. The District Court granted summary judgment to Monica Gayton since Macdonald did not file a judgment lien against Gayton's property prior to his death.

Two questions are presented:

1. Whether the court's refusal to give full effect to the *nunc pro tunc* judgment, which was entered due to a delay by the court, resulted in prejudicing Macdonald's rights to pursue his claim.

2. Whether the Uniform Fraudulent Transfer Act contains a requirement for a creditor to record a lien against real property in order to pursue a claim.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 4

REASONS FOR GRANTING THE PETITION 7

CONCLUSION 14

APPENDIX

Circuit Court Opinion 1a

District Court Order 7a

Order Denying Rehearing 15a

TABLE OF AUTHORITIES

Page

CASES

BORER V. CHAPMAN, 119 U.S. 587, 602 (1887) 8

DEMARTINI V. DEMARTINI, 385 ILL. 128, 133 (1943) 12

FILES V. EXXON MOBIL PENSION PLAN, 428 F.3D 478 (3RD CIR. 2005), CERT. DENIED, 123 S.CT. 2304 (2006) 10

GALENSKI V. FORD MOTOR CO. PENSION PLAN, 421 F. SUPP. 2D 1015, 1020 (E. D. MICH. 2006) 11

HARRIS V. COMMISSIONER OF INTERNAL REVENUE, 340 U.S. 106, 113 (1950) 5, 7, 8

HOGAN V. RAYTHEON CO., 302 F.3D 854, 857 (8TH CIR. 2002) 10

LOGAN V. ZIMMERMAN BRUSH CO., 455 U.S. 422 (1982) 9

MACDONALD V. ESTATE OF GAYTON, 469 F.3D 1079 (7TH CIR. 2006) 1

MAGNER V. MUSLIN, 344 ILL. APP. 475, 479, 100 N.E.2D 344 (1951) 13

MIDDLETON V. DAN RIVER, INC., 617 F. SUPP. 1206 (M. D. ALA. 1985) 8, 9

MILLER V. KENNEDY, 148 B.R. 510, 518 (N.D. ILL. 1992) 13

MITCHELL V. OVERMAN, 103 U.S. 62, 65 (1880) 5, 7, 8

PATTON V. DENVER POST CORP., 326 F.3D 1148, 1153 (10TH CIR. 2003) 10

SPIKINGS V. ELLIS, 290 ILL. APP. 585, 594, 8 N.E.2D 962 (1937) 13

TCHEREPNIN V. FRANZ, 489 F. SUPP. 43, 45 (N.D. ILL. 1980) 13

TRANSAMERICA INS. CO. V. SOUTH, 975 F.2D 321, 326 N.2 (7TH CIR. 1992) 8

TRUSTEE OF DIRECTOR'S GUILD OF AMERICA PRODUCER BEN. PLANS V. TICE, 234 F.3D 415 (9TH CIR. 2000) 10

STATUTES

28 U.S.C. Section 1254(1) 1

28 U.S.C. Section 2101(c) 1

740 ILCS 160/1 ..... 4, 6

740 ILCS 160/8 1

740 ILCS 160/8(a) 12

740 ILCS 160/8(a)(1) 12

740 ILCS 160/8(b) 12

740 ILCS 160/9 2

740 ILCS 160/9(b) 12

740 ILCS 160/9(b)(1) 12, 13

740 ILCS 160/12 4

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Macdonald v. Estate of Gayton*, 469 F.3d 1079 (7th Cir. 2006). It is reproduced in the Appendix at App. 1a. The opinion denying the Petition For Rehearing ia reproduced in the Appendix at App. 15a. The opinion of the District Court granting summary judgment to Monica M. Gayton is unreported and is reproduced in the Appendix at App. 7a.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit affirming the decision of the District Court which *sua sponte* granted summary judgment to the respondent in this action brought by the petitioner for breach of contract, was entered on September 8, 2006; and its further order denying the petitioner's timely filed combined petition for panel rehearing or for rehearing *en banc* was filed and decided on December 27, 2006(App. 1-19;33).

This petition for writ of certiorari is filed within ninety (90) days of December 27, 2006. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

RELEVANT PROVISIONS INVOLVED

(740 ILCS 160/8) (from Ch. 59, par. 108)
Sec. 8. (a) In an action for relief against a transfer or obligation under this Act, a creditor,

subject to the limitations in Section 9, may obtain:

(1)avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(2)an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by the Code of Civil Procedure;

(3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure,

(A) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(B) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(C) any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

(Source: P.A. 86—814.)

(740 ILCS 160/9) (from Ch. 59, par. 109)

Sec. 9. (a) A transfer or obligation is not voidable under paragraph (1) of subsection (a) of Section 5 against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this Section, to the extent a transfer is voidable in an action by a creditor under paragraph (1) of subsection

(a) of Section 8, the creditor may recover judgement for the value of the asset transferred, as adjusted under subsection (c), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(1) the first transferee of the asset or the person for whose benefit the transfer was made; or

(2) any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee.

(c) If the judgment under subsection (b) is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this Act, a good—faith transferee or obligee is entitled, to the extent of the value given the debtor for

the transfer or obligation, to

(1)a lien on or a right to retain any interest in the asset transferred;

(2)enforcement of any obligation incurred; or

(3)a reduction in the amount of the liability on the judgment.

(e)A transfer is not voidable under paragraph (2) of subsection (a) of Section 5 or Section 6 if the transfer results from:

(1)termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(2)enforcement of a security interest in compliance with Article 9 of the Uniform

Commercial Code.
(f) A transfer is not voidable under subsection (b) of Section 6:
(1)to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;
(2) if made in the ordinary course of business or financial affairs of the debtor and the insider; or
(3) if made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.
(Source: P.A. 86—814.)

(740 ILCS 160/12) (from Ch. 59, par. 112)
Sec. 12. This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it. (Source: P.A. 86—814.)

STATEMENT

Petitioner seeks review of the ruling of the Seventh Circuit Court of Appeals which, held that James M. Macdonald could not pursue his claim under the Uniform Fraudulent Transfer Act, 740 ILCS 160/1 *et seq.*, where he did not file a lien on the property before the debtor died due to a delay by the District Court in entering a judgment. The actions of the District Court made it impossible for Macdonald to comply with the requirement of filing a judgment lien on the property before the debtor's death. Although the District Court judge sought to remedy his delay by

entering the judgment *nunc pro tunc* to a date prior to debtor's death, the Seventh Circuit Court of Appeals affirmed the entry of summary judgment for the debtor's wife.

Petitioner seeks review of the Seventh Circuit's ruling because it is in conflict and fails to follow the rule of law of this court in *Mitchell v. Overman*, 103 U.S. 62, 65 (1880) and *Harris v. Commissioner of Internal Revenue*, 340 U.S. 106, 113 (1950), and further is in conflict with other Courts of Appeals on the application of *nunc pro tunc* orders and judgments. It also sets forth precedent for cases involving the Uniform Fraudulent Transfer Act, which has been adopted by ____ states and contains a provision which calls for the Act to be interpreted uniformly be states which have enacted it, which establishes a prerequisite which is not contained anywhere in the Act.

The petition arises out of a number of loans and accompanying notes totaling Three Hundred Twenty Five Thousand Dollars ($325,000.00) made by James M. Macdonald, II, to Joseph W. Gayton prior to February 2, 2001. On February 2, 2001, Joseph Gayton executed a quitclaim deed which attempted to convey all of his interest in property located at 3524 Riverside Drive, Wilmette, Illinois, to his wife, Monica Gayton. Prior to the execution of the quitclaim deed on February 2, 2001, Monica Gayton, Joseph Gayton, and the attorney who prepared the quitclaim deed, were all aware that Joseph Gayton owed at least Two Hundred Seventy Five Thousand Dollars to Macdonald prior to the preparation and execution of the quitclaim deed. C). There was no consideration paid by Monica Gayton for the quitclaim deed.

On August 7, 2003, Macdonald filed a lawsuit against Joseph Gayton in the United States District Court for the Northern District of Illinois, Eastern Division, Case No. 03 C 5483, to collect on the notes relating to the loans made by Macdonald to Gayton. On December 22, 2003, *nunc pro tunc* October 28, 2003, a judgment in the amount of Three Hundred Fifty Seven Thousand One Hundred Thirty Nine Dollars and Eighty Nine Dollars ($357,13989) was entered by Judge Charles R. Norgle, Sr., in favor of Macdonald and against Joseph Gayton.

Joseph Gayton died on November 26, 2003. At the time of his death, Joseph Gayton had "zero" assets. Macdonald thereafter filed the underlying case seeking, for purposes of satisfying his judgment, to set aside the quitclaim deed transfer under the Uniform Fraudulent Transfer Act. 740 ILCS 160/1 *et seq.* ("UFTA"). On June 9, 2005, Monica Gayton was given leave to file her motion for summary judgment. On August 30, 2005, the district court entered judgment in favor of Monica Gayton on her motion for summary judgment finding that Macdonald could not obtain relief under the UFTA because he did not record a lien on the property prior to Joseph Gayton's death.

Macdonald appealed the decision of the Northern District of Illinois to the Seventh Circuit Court of Appeals. There, the Seventh Circuit affirmed the decision of the Northen District of Illinois, and subsequently denied a petition for rehearing.

REASONS FOR GRANTING THE PETITION

A. *The Decision Below Fails to Follow the Rule of Law as Set By this Court, and Conflicts With Decisions of Other Courts of Appeals, Relating to the Application of Nunc Pro Tunc Orders*

The Seventh Circuit's decision ignores and fails to take into account this Court's prior rulings which hold that where the delay in entering judgment is caused by an act of the court, it is the court's duty to see that the party does not suffer by the delay. *Mitchell v. Overman*, 103 U.S. 62, 65 (1880); *Harris v. Commissioner of Internal Revenue*, 340 U.S. 106, 113 (1950).

The Seventh Circuit held that, "to reach the property for the purpose of satisfying the ***$357,139.89 judgment, [Macdonald] must have perfected a lien on the property while Gayton held*** an interest in the property." It further stated that, "[s]ince Macdonald did not record a lien against the property while Gayton was alive, the property passed to Monica unencumbered by the judgment at Gayton's death." The Seventh Circuit observed, without explanation, that "the district court's entry of judgment nunc pro tunc" does not "cure[] Macdonald's inability to file a judgment lien while Gayton held an interest in the property." Nothing could cure this failure, except for the *nunc pro tunc* order. It was the court's delay that created this inequity.

Macdonald respectfully submits that the Seventh Circuit's refusal to give full effect to the *nunc pro tunc* judgment and allow the fraudulent transfer

cause to proceed violates his rights to due process and is inconsistent with well-established precedent of this Court and several other Courts of Appeals. It has long been established that a litigant who is entitled to a judgment should not be prejudiced by delay of the court, particularly where, as here, a litigant died during the pendency of the proceedings. *See, e.g., Transamerica Ins. Co. v. South*, 975 F.2d 321, 326 n.2 (7th Cir. 1992), citing *Mitchell v. Overman*, 103 U.S. 62, 65 (1880)("[W]here the delay in rendering a judgment or a decree arises from the act of the court . . . it is the duty of the court to see that the parties shall not suffer by the delay."); *Harris v. Commissioner of Internal Revenue*, 340 U.S. 106, 113 (1950) (citing *Mitchell*, entering judgment *nunc pro tunc* where litigant died). This Court has also held that a judgment entered *nunc pro tunc* to an earlier date should not operate to bar a claim under an applicable state statute of limitations, noting that "[i]t cannot be that the statute of limitations will be allowed to commence to run against a right until that right has accrued in a shape to be effectively enforced." *Borer v. Chapman*, 119 U.S. 587, 602 (1887).

Enforcement of a judgment *nunc pro tunc* may result in alteration or enhancement of substantive state law rights or procedural requirements. In *Middleton v. Dan River, Inc.*, 617 F. Supp. 1206 (M. D. Ala. 1985), *aff'd in relevant part*, 834 F.2d 903, 911 (11th Cir. 1987), a court ruled that a claimant for workers' compensation benefits was entitled to judgment *nunc pro tunc* – even where it ultimately altered the outcome of the litigation under state law – because the claimant died while post-trial motions were being considered. *Middleton*, 617 F. Supp. at 1221, 1224. The *Middleton* court also observed that a court's delay in rendering judgment

could violate due process if the delay resulted in barring a claim that would otherwise prevail, and the litigant would be left without any "post-deprivation remedy." *Id.* at 1225 (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (holding that state procedure violated due process by barring an employment discrimination claim as result of state officials' delay in considering claim).

Macdonald's "inability" to perfect a lien on the Wilmette property was not due to any fault of his own, but rather was the direct result of an inexplicable delay in entering the default judgment against Joseph Gayton, which was fully documented and "ripe" on October 28, 2003. The procedural circumstances of this case – through no fault of Macdonald – rendered it impossible for Macdonald to comply with the Illinois substantive law as stated by the Seventh Circuit. The entry of a *nunc pro tunc* order was Judge Norgle's attempt to rectify some of the manifest injustice that resulted from his delay in entering the judgment and the intervening death of Joseph Gayton on November 26, 2003.

The fact that Macdonald's default judgment was not promptly, physically entered on October 28, 2003, made compliance with the lien prerequisite impossible for Macdonald. Had the default judgment been entered on October 28, 2003, Macdonald would have had nearly a month to attempt to perfect a purported lien on the property prior to Joseph Gayton's death, and thus preserve his ability to attack the fraudulent transfer as required by the Seventh Circuit's Court's holding and any Illinois law. As it stands, Macdonald was deprived of that opportunity from the outset by the court's delay

in entering the default judgment.

Other Federal courts have not hesitated to enforce *nunc pro tunc* orders that result in enforcement of pre-existing property rights after a litigant's death. In *Files v. Exxon Mobil Pension Plan*, 428 F.3d 478 (3rd Cir. 2005), *cert. denied*, 123 S.Ct. 2304 (2006), the former wife of a deceased pension plan participant enforced her rights to plan benefits, after her former husband's death, by obtaining a *nunc pro tunc* domestic relations order awarding her survivor benefits under an Employee Retirement Income Security Act ("ERISA") plan. The lower court initially refused to honor the *nunc pro tunc* order on the ground that the right to benefits lapsed after the ex-husband's death, and the wife had not filed, prior to his death, a "qualifying domestic relations order ("QDRO")" as required by ERISA. *Files*, 428 F.3d at 485. The Third Circuit reversed, and gave effect to the *nunc pro tunc* order, noting that ERISA did not contain any provision requiring a QDRO to be in place prior to a participant's death, where that order sought to enforce rights that existed before the death of the plan participant. *Id.*, at 491. *See also, e.g., Patton v. Denver Post Corp.*, 326 F.3d 1148, 1153 (10th Cir. 2003) (holding that *nunc pro tunc* order related back to time before plan participant's death); *Hogan v. Raytheon Co.*, 302 F.3d 854, 857 (8th Cir. 2002) (fact that participant died before order was entered was "irrelevant" to enforcement of the order); *Trustee of Director's Guild of America Producer Ben. Plans v. Tice*, 234 F.3d 415 (9th Cir. 2000) (QDRO obtained after participant's death was enforced where claimant filed rule to show cause while participant was living); *Galenski v. Ford Motor Co. Pension Plan*, 421 F. Supp. 2d 1015, 1020 (E. D. Mich.

2006) (QDRO could be enforced posthumously and made effective *nunc pro tunc* to a date prior to the plan participant's death).

The decision of the Seventh Circuit disregards this Court's propr precedent of the application of *nunc pro tunc* orders. It further creates a split among the Courts of Appeals as it relates to this same application. This Court's opinions establish that a litigant is entitled to protection from judicial delays, and the Seventh Circuit has utterly ignored this precedent, and deprived Macdonald of his rights of due process.

B. The Court of Appeals Decision Establishes a Prerequisite Which is Not Contained in the Uniform Fraudulent Transfer Act

The decision of the Seventh Circuit establishes a lien prerequisite under the Uniform Fraudulent Transfer Act which makes recovery under such Act essentially impossible and provides a blueprint for debtors to dispose of their property to avoid the reach of creditors. This case is not simply about Illinois state law, as forty three states have adopted the Uniform Fraudulent Transfer Act, and the Act contains a section stating that it should be applied and construed uniformly among the states adopting it, the setting of this precedent will have an impact in the forty three states that have adopted the Act.

The Seventh Circuit's decision places a burden on creditors to place a lien on fraudulently transferred property as a prerequisite to pursuing a lawsuit relating to the transfer. However, until the transfer is found to be fraudulent, it is not the property of the

debtor nor can it be used to satisfy any debt. The decision places a burden on a creditor to record a judgment lien on property that, until found otherwise in a fraudulent transfer case, does not belong to the debtor. If a debtor transfers his property before the entry of a judgment, he has no interest, legal or equitable, in the property upon which a lien can rest. *DeMartini v. DeMartini*, 385 Ill. 128, 133 (1943). Thus, the Seventh Circuit's decision places a prerequisite of placing a lien on property, which under state law, no such lien can rest. This spurious scenario resembles Lewis Carroll's "Alice In Wonderland."

The UFTA provides a creditor the right to seek the avoidance of a fraudulent transfer to the extent necessary to satisfy the creditor's claim. 740 ILCS 160/8(a)(1). The court may also levy execution on the asset transferred if a creditor has obtained a judgment against the debtor who transferred the property. 740 ILCS 160/8(b).

To the extent a transfer is voidable under 740 ILCS 160/8(a), a creditor may "recover judgment for the value of the asset transferred . . . or the amount necessary to satisfy the creditor's claim, whichever is less." 740 ILCS 160/9(b). The judgment may be entered against the person to whom the asset was transferred. 740 ILCS 160/9(b)(1).

If property is found to have been fraudulently transferred and thus void as to creditors, it is still valid as between the parties to the transaction. *De Martini v. De Martini*, 385 Ill. At 134. "A conveyance of this sort is void only as against creditors, and then only to the extent to which it may be necessary to deal with

the conveyed estate for their satisfaction. To this extent and to this only, it is treated as if it had not been made. Satisfy the creditors, and the conveyance stands." *Id.*

However, as it relates to a creditor's claim, the transferred asset is not transferred back to the debtor nor does it again become his property. *Id.* The property is "merely made subject to be applied to the payment of [creditor's] judgment to the same extent as it might have been had it remained the property of the judgment debtor." *Id., see also, Miller v. Kennedy*, 148 B.R. 510, 518 (N.D. Ill. 1992). The debtor's interest in the property is subjected to the payment of a judgment. *Spikings v. Ellis*, 290 Ill. App. 585, 594, 8 N.E.2d 962 (1937). The court may order that the interest in the property be sold, or the creditor may recover the property or its cash value. *See, e.g., Tcherepnin v. Franz*, 489 F. Supp. 43, 45 (N.D. Ill. 1980); *Magner v. Muslin*, 344 Ill. App. 475, 479, 100 N.E.2d 344 (1951).

As the property is never transferred back to the debtor, no creditor could ever place a lien on the property - whether a debtor is deceased or not. Thus, under the decision in this case, no creditor would never be able to seek payment of judgment through fraudulently transferred property.

The remedies available to creditors are set forth in the UFTA. None of the remedies contain a provision that requires the recording of a lien as a prerequisite to recovery. The Seventh Circuit's decision provides an improper interpretation of the UFTA which, under the terms of Act itself, can be used in the forty three states that have adopted it.

CONCLUSION

For the foregoing reasons, this petition should be granted.

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No. 05-4354

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES M. MACDONALD, II, as Trustee and sole beneficiary of the WALTER MIDDLETON & COMPANY RETIREMENT PLAN and WALTER MIDDLETON & COMPANY FROZEN RETIREMENT PLAN,

Plaintiff-Appellant,

v.

ESTATE OF JOSEPH W. GAYTON and MONICA M. GAYTON,

Defendant-Appellee.

November 2, 2006, Argued

December 1, 2006, Decided

COUNSEL: For JAMES M. MACDONALD, as Trustee and sole beneficiary of the WALTER MIDDLETON & COMPANY RETIREMENT PLAN and WALTER MIDDLETON & COMPANY FROZEN RETIREMENT PLAN, Plaintiff - Appellant: Brian T. Bailey, BAILEY & BAILEY, Burr Ridge, IL.

For ESTATE OF JOSEPH W. GAYTON AND MONICA M. GAYTON, Defendant - Appellee: Nancy

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JUDGES: Before BAUER, RIPPLE, and MANION, Circuit Judges.

OPINION BY: BAUER

OPINION: BAUER, *Circuit Judge.* The facts in this case are not in dispute. At some time prior to February 2, 2001, James M. Macdonald II loaned Joseph Gayton $ 325,000. On February 2, 2001 and before repaying his debt to Macdonald, Gayton conveyed his interest in his family home to his wife, Monica, by way of a quitclaim deed. Prior to this transfer, Gayton and Monica had held the property as joint tenants. The transfer was recorded with the Recorder of Deeds on March 15, 2001.

Macdonald, as Trustee and sole beneficiary of the Walter Middleton & Company Retirement Plan and Walter Middleton & Company Frozen Retirement Plan, filed a diversity suit against Gayton on August 7, 2003 that alleged that Gayton had failed to make payments on certain notes owed by Gayton to the plans. Gayton died on November 26, 2003 without any assets. On December 22, 2003, the district court entered judgment *nunc pro tunc* as of October 28, 2003 in favor of Macdonald in the amount of $ 357,139.89. On January 16, 2004, Macdonald filed the present action against Gayton's estate and Monica to set aside the property transfer under the Illinois Uniform Fraudulent Transfer Act, 740 ILCS 160/1 et seq. ("UFTA"). The district court granted Monica's motion for summary judgment, finding that no relief was available to

Macdonald under the UFTA because Macdonald did not have a recorded lien against Gayton's family home prior to Gayton's death. As a result, the district court reasoned, even if the property transfer was fraudulent, the property passed to Monica, Gayton's surviving joint tenant, extinguishing any rights that Macdonald may have had to the property. Macdonald filed this timely appeal. We affirm.

I. Discussion

We review the district court's grant of summary judgment *de novo. Durkin v. Equifax Check Services, Inc.*, 406 F.3d 410, 414 (7th Cir. 2005).

The UFTA establishes a creditor's right to file an action to obtain the avoidance of a fraudulent transfer or obligation to the extent necessary to satisfy the creditor's claim. 740 ILCS 160/8(a)(1). The UFTA states, in part, that

[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: (1) with actual intent to hinder, delay, or defraud any creditor of the debtor...
740 ILCS 160/5. To the extent that a transfer is voidable in an action by a creditor, the creditor may obtain a judgment for the value of the asset transferred or the amount necessary to satisfy the creditor's claim, whichever is less. 740 ILCS 160/9(b). This judgment may be entered against either the first transferee of the asset or the person for whose benefit the transfer was made. 740 ILCS 160/9(b)(1). Macdonald argues that if

he establishes that Gayton's transfer of his interest in his family home to Monica was a fraudulent transfer, he is entitled to obtain a judgment against Monica for the amount necessary to satisfy Macdonald's claim. We disagree.

Assuming that Gayton's transfer of his interest in his family home was fraudulent, the UFTA would nullify the transfer and the property would be restored to the joint tenancy with right of survivorship. *See Gayton v. Kovanda*, N.E.2d , 857 N.E.2d 929, 2006 Ill. App. LEXIS 965, 306 Ill. Dec. 530, 2006 WL 3026035, at *4 (Ill. App. Ct. Oct. 25, 2006) (stating that fraudulent transfer of a joint tenant's interest in property does not sever the joint tenancy) (citing *Gilbert Bros., Inc. v. Gilbert*, 630 N.E.2d 189, 258 Ill. App. 3d 395, 196 Ill. Dec. 492 (Ill. App. Ct. 1994)).[1] In other words, we would treat the property as though the fraudulent transfer had not occurred. *Id.* (citing *De Martini v. De Martini*, 52 N.E.2d 138, 141, 385 Ill. 128, 134 (1943) (a fraudulent conveyance is void only as against creditors and the conveyance is treated as though it had not occurred)). After Gayton transferred his interest in the property to Monica and before his death, Gayton and Monica held the property as joint tenants. Once Gayton died, his interest in the property passed to Monica as a joint tenant through rights of survivorship.

For Macdonald to reach the property for the purpose of satisfying the $ 357,139.89 judgment, he must have perfected a lien on the property while Gayton held an interest in the property. Under Illinois law, a judgment only becomes a lien on the real estate of the person against whom it is entered once the judgment is filed with the recorder of deeds in the county in which the

real estate is located. *Id.* (citing 735 ILCS 5/12-101, *Cochran v. Cutler*, 350 N.E.2d 59, 62, 39 Ill. App. 3d 602, 607 (Ill. App. Ct. 1976)). Since Macdonald did not record a lien against the property while Gayton was alive, the property passed to Monica unencumbered by the judgment at Gayton's death. Neither the UFTA nor the district court's entry of judgment *nunc pro tunc* cures Macdonald's inability to file a judgment lien while Gayton held an interest in the property. Thus, the district court properly granted summary judgment to Monica because the UFTA affords Gayton no relief.

II. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Macdonald asks us to depart from the decision of the First District Appellate Court of Illinois in *Gayton v. Kovanda*, which addresses the same issue raised in the instant appeal: whether, pursuan t to the UFTA, a creditor of Gayton may reach property fraudulently transferred to Monica to satisfy a judgment when the judgment lien was not recorded until after Gayton's death. 2006 Ill. App. LEXIS 965, 2006 WL 3026035. The Illinois appellate court, like the district court, answered this query in the negative. 2006 Ill. App. LEXIS 965, 2006 WL 3026035, at *4. Macdonald argues that the sole authority cited by the Illinois appellate court for its decision is Judge Manning's slip opinion, which is the subject of the instant appeal. He further asserts that the Illinois appellate court offers no other analysis or

explanation for the proposition that when Gayton died, the property passed to Monica as a joint tenant through rights of survivorship. This argument not only misrepresents the basis of the Illinois appellate court's decision, which cited to Judge Manning's opinion in further support of its decision rather than as the basis of its decision, it fails to recognize that we defer to an Illinois court's interpretation of state law. *See City of Chicago v. Morales*, 527 U.S. 41, 61, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999); *Gresham v. Peterson*, 225 F.3d 899, 908 (7th Cir. 2000). As such, we will follow *Kovanda* in deciding Macdonald's appeal.

No. 04 C 0334

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

JAMES M. MCDONALD II, as Trustee and sole beneficiary of the WALTER MIDDLETON & COMPANY RETIREMENT PLAN and WALTER MIDDLETON & COMPANY FROZEN RETIREMENT PLAN,
Plaintiffs,

v.

ESTATE OF JOSEPH W. GAYTON and MONICA M. GAYTON,
Defendants.

August 30, 2005, Decided
August 30, 2005, Filed

COUNSEL: For James M MacDonald, II, as trustee and sole beneficiary of the Walter Middleton & Company Retirement Plan and Walter Middleton & Company Frozen Retirement Plan, Plaintiff: Brian Thomas Bailey, James M. Bailey, Julie Line Bailey, Bailey & Bailey, Chicago, IL.

For Monica M Gayton, Estate of, Defendant: Peter D. Sullivan, Barry Francis Mac Entee, Hinshaw & Culbertson, Chicago, IL.

JUDGES: Judge Manning, Magistrate Judge Nolan.

OPINION BY: Blanche M. Manning

OPINION:

MEMORANDUM AND ORDER

Plaintiff James M. Macdonald II, as Trustee and sole beneficiary of the Walter Middleton & Company Retirement Plan and Walter Middleton & Company Frozen Retirement Plan ("MacDonald"), alleges that Joseph Gayton ("Joseph"), fraudulently transferred property to defendant Monica Gayton ("Monica") in violation of the Illinois Uniform Fraudulent Transfer Act, *740 ILCS 160/1 et seq.* ("UFTA"). Monica seeks summary judgment pursuant to *Federal Rule of Civil Procedure 56*. For the following reasons, the motion is granted.

I. BACKGROUND

The facts of this case are not in dispute. MacDonald loaned Joseph $ 325,000 at some point prior to February 2, 2001. At least seven years prior to February 2, 2001, Joseph and Monica owned real estate located at 3524 Riverside Drive, Wilmette, Illinois ("Wilmette home") as joint tenants. On February 2, 2001, Joseph executed a quitclaim deed conveying his interest in the Wilmette home to Monica. The parties agree that both Monica and Joseph, as well as the attorney who prepared the quitclaim deed, were aware that Joseph was indebted to MacDonald prior to preparation and execution of the quitclaim deed. Shortly thereafter, on March 15, 2001, the February 2, 2001, conveyance was recorded with the Recorder of Deeds.

On August 7, 2003, Macdonald filed suit against Joseph in the United States District Court for the Northern District of Illinois, Eastern Division, Case No. 03 C 5483, alleging breaches of certain notes. Joseph died on November 26, 2003. MacDonald did not perfect or record a judgment lien against the Wilmette home prior to Joseph's death. However, on December 22, 2003, in case no. 03 C 5483, the court entered judgment *nunc pro tunc* as of October 28, 2003, in favor of Macdonald and against Joseph in the amount of $ 357,139.89. MacDonald never obtained a judgment against Monica.

MacDonald then filed the instant action seeking to avoid the transfer of the Wilmette home to Monica under the Illinois Uniform Fraudulent Transfer Act so that he could then levy on the Wilmette home to satisfy the judgment against Joseph. Monica has moved for summary judgment.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper when the "pleadings, depositions, answer to interrogatories, and admissions on files, together with the affidavits, if any, show that there is no genuine issue of any material fact." *Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).* "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Valenti v. Qualex, Inc., 970 F.2d 363, 365 (7th Cir. 1992).* Further, a court should grant summary judgment only when the record shows that a reasonable jury could not find for the nonmoving party. *Id.*

III. ANALYSIS

Monica contends that even if the transfer was fraudulent under *section 5 of the UFTA* (which she denies), MacDonald cannot obtain the relief he seeks. Specifically, Monica argues that MacDonald could not have perfected a lien on the Wilmette home with respect to the judgment against Joseph because he did not have an interest in the Wilmette home at the time that MacDonald obtained the judgment against him.

A judgment against an individual is not automatically deemed a lien against the judgment debtor's real property until the judgment creditor perfects a lien on the judgment debtor's real property pursuant to the method required by the Illinois Code of Civil Procedure. *735 ILCS 5/12-101. Section 5/12-101* of the Illinois Code of Civil Procedure requires a judgment debtor to file the judgment in the office of the recorder of deeds in the county in which the real estate is located. *Casey National Bank v. Roan, 282 Ill. App. 3d 55, 668 N.E.2d 608, 612, 218 Ill. Dec. 124 (Ill. App. Ct. 1996).* Thus, in order for MacDonald to perfect a lien on the Wilmette home, he must have recorded a judgment lien against the Wilmette home during the period in which Joseph had an interest in the home.

Given that Joseph conveyed the Wilmette home to his wife on February 2, 2001, Joseph had no interest in the property on the date of the October 28, 2003 judgment. Because a party may only attach a lien as to property *possessed* by a judgment creditor at the time the judgment is entered, MacDonald has no lien on the property as to Joseph. *McDonald v. Estate of Gayton, 2004 U.S. Dist. LEXIS 28481, 04 C 334, docket no. 13, (N.D. Ill. Sept. 17, 2004)* (denying petitioner's motion to intervene because "at the time [petitioner] filed his lien against Mr. Gayton's interest in the Wilmette home,

Mrs. Gayton was the sole owner of the property. This means that the lien is invalid under Illinois law since at the time it came into existence, Mr. Gayton had no interest in the Wilmette property.") (citations omitted). n1 Indeed, no lien can exist even if the alleged fraudulent transfer were set aside because the transfer of the property as between Joseph and his wife is valid. *De Martini v. De Martini, 385 Ill. 128, 52 N.E.2d 138, 140 (Ill. 1943)* ("it is well established that a transfer of property fraudulent and void as to creditors *is nevertheless valid as between the parties thereto.*") (emphasis added).

MacDonald acknowledges that he does not have a lien and states "although the cases may state that MacDonald does not have a lien at this point, they do not prohibit him from pursuing the cause of action under the UFTA." Resp. at 4. MacDonald argues that even if the transfer is intact as between Monica and Joseph, the property can still be used to satisfy the judgment against Joseph, assuming MacDonald can prove that the fraudulent transfer occurred. Specifically, MacDonald states that the UFTA "allows this Court to enter a judgment against the 'first transferee', in this case Defendant Monica Gayton. MacDonald would be allowed to recover either the property itself or its cash value in satisfaction of the debt." Resp. at 6 (citations omitted).

Under the UFTA, "except as otherwise provided in this Section, to the extent a transfer is voidable in an action by a creditor under paragraph (1) of subsection (a) of Section 8, the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c), or the amount necessary to satisfy the creditor's claim, whichever is less." *740 ILCS 160/9(b).*

Further, "the judgment may be entered against: (1) the first transferee of the asset or the person for whose benefit the transfer was made." *740 ILCS 160/9(b)(1).*

However, an Illinois court addressing a similar fraudulent transfer claim, has stated:

Moreover, apart from the dismissal [on statute of limitations grounds], the Company's [fraudulent transfer] claim is moot because the company alleges that Nick, as a joint tenant, fraudulently transferred his interest to the other joint tenant, his wife, and then he died. Assuming the Company was successful on the merits of its claim for fraudulent transfer, the court would reinstate the property as it was at the time prior to the fraudulent transfer. *Because Nick's death occurred prior to any judgment received by the Company, the property would have transferred to the surviving joint tenant at that time of death, extinguishing any rights the Company may have had.*

Gilbert Bros. v. Gilbert, 258 Ill. App. 3d 395, 630 N.E.2d 189, 192-93, 196 Ill. Dec. 492 (Ill. App. Ct. 1994) (emphasis added).

MacDonald makes much of the fact that the judgment in his favor was entered *nunc pro tunc* as of October 28, 2003 (i.e., prior to Joseph's death). However, the fact that the judge entered the judgment order *nunc pro tunc* did nothing to help MacDonald as he did not record the lien prior to Joseph's death. At the time of Joseph's death, regardless of whether the prior transfer was fraudulent or not, the property passed to Monica. MacDonald has not cited to any authority for the proposition that a judgment order entered *nunc pro tunc* prior to a judgment debtor's death also

somehow simultaneously creates a recorded lien *nunc pro tunc.*

Because MacDonald cannot obtain relief under the UFTA, defendant's motion for summary judgment is granted.

IV. CONCLUSION

For the reasons stated above, the court grants Monica's motion for summary judgment [33-1].

ENTER:

Blanche M. Manning

United States District Judge

DATE: August 30, 2005

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the court grants Monica's motion for summary judgment [33-1].

Date: 8/30/2005

Footnotes

n1 Moreover, MacDonald admitted in a response brief to an earlier motion to intervene that Gayton ceased to have an interest in the Wilmette home after February 2, 2001. *See* Plaintiff's Response to Louis Kovanda's Motion to Intervene and Removal filed August 5, 2004 ("Since Joseph Gayton had no interest in the property

located at 3524 Riverside Drive, Wilmette, Illinois, after February 2, 2001, Kovanda's judgment lien recorded on December 3, 2003 is not valid.")

No. 05-4354

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES M. MACDONALD, II, as Trustee and sole beneficiary of the WALTER MIDDLETON & COMPANY RETIREMENT PLAN and WALTER MIDDLETON & COMPANY FROZEN RETIREMENT PLAN,

Plaintiff-Appellant,

v.

ESTATE OF JOSEPH W. GAYTON and MONICA M. GAYTON,

Defendant-Appellee.

January 8, 2007, Decided

COUNSEL: For JAMES M. MACDONALD, as Trustee and sole beneficiary of the WALTER MIDDLETON & COMPANY RETIREMENT PLAN and WALTER MIDDLETON & COMPANY FROZEN RETIREMENT PLAN, Plaintiff - Appellant: Brian T. Bailey, BAILEY & BAILEY, Burr Ridge, IL.

For ESTATE OF JOSEPH W. GAYTON AND MONICA M. GAYTON, Defendant - Appellee: Nancy G. Lischer, Barry F. MacEntee, HINSHAW & CULBERTSON, Chicago, IL USA.

JUDGES: Before Hon. William J. Bauer, Circuit Judge, Hon. Kenneth F. Ripple, Circuit Judge, Hon. Daniel A. Manion, Circuit Judge.

OPINION BY: William J. Bauer; Kenneth F. Ripple; Daniel A. Manion

OPINION: ORDER

On consideration of the petition for rehearing filed in the above-captioned case by plaintiff-appellant on December 15, 2006, all of the judges on the original panel have voted to DENY the petition for rehearing. The petition for rehearing is therefore DENIED.